(2)

No. 04-392

Supreme Court, U.S.
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In The Supreme Court of the United States

MARGARET PALCKO,

Petitioner,

v.

AIRBORNE EXPRESS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AIRBORNE EXPRESS, INC.

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit had jurisdiction to review the District Court's holding that § 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), preempts state law favoring the enforcement of arbitration agreements in an interlocutory appeal of an order denying a motion to compel arbitration under § 4 of the FAA.[1]

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[1] Petitioner raised three (3) questions in her Petition for Writ of Certiorari ("Petition"), to which Respondent waived its right to file a brief in opposition on the ground that the case did not warrant review by this Court. Respondent respectfully submits this Brief in Opposition in response to the Court's request for a response only to Question 2 raised in the Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Airborne Express, Inc. is a wholly owned subsidiary of Airborne, Inc. Airborne, Inc. is a wholly owned subsidiary of DHL Holdings (USA), Inc. DHL Holdings (USA), Inc. is an indirect subsidiary of Deutsche Post AG. The stock of Deutsche Post is publicly traded in Europe but not in the United States.

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COUNTER STATEMENT OF THE CASE

Petitioner Margaret Palcko ("Palcko"), a former management employee for Respondent Airborne Express, Inc. ("Airborne"), entered into a Mutual Agreement to Arbitrate Claims with Airborne (the "Agreement") at the time of hire, pursuant to which both parties agreed to the arbitration of all claims relating to her employment. The Agreement provides that except as it otherwise specifies:

> [T]he Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, Washington law pertaining to agreements to arbitrate shall apply.

Airborne, headquartered in Seattle, Washington, is a package and transportation company engaged in intrastate, interstate and international shipping. Palcko, a Field Service Supervisor for Airborne, supervised and monitored the intrastate activities of rank and file union drivers who delivered packages from a local facility near the airport to their local destinations, and picked up packages from local customers and brought them back to the facility for shipment. Palcko did not handle packages herself. (Pet'r App. 2a-3a)

In response to Palcko's Complaint asserting claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2004), and the Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-963 (2004), and her subsequent refusal to submit her claims to arbitration as called for in the Agreement (Pet'r App. 2a, 18a), Airborne filed a Motion to Compel Arbitration in accordance with § 4 of the FAA. The District Court entered a single Order denying the Motion. (Pet'r App. 30a) The accompanying Memorandum Opinion

construed § 1 of the FAA as including Palcko within a class of workers similar to seamen and railroad employees, thereby excluding her Agreement from coverage under the FAA. The District Court also construed § 1 to preempt and prohibit the enforcement, pursuant to state law, of the arbitration agreements of excluded workers. The District Court did not reach Palcko's contention that her agreement with Airborne "is invalid under state law." (Pet'r App. 29a-30a, n.2)

Airborne timely appealed the District Court's order to the Court of Appeals, following which the District Court stayed the matter pending resolution of Airborne's Appeal. (C.A. App. 7; Order dated June 3, 2003) Based upon the single order denying its Motion to Compel Arbitration and the District Court's exclusive reliance upon its statutory construction of the § 1 exclusion to deny the Motion, Airborne initially asserted only § 16(a) of the FAA as the basis for appellate jurisdiction. (Brief of Appellant Airborne, 1) In response to the jurisdictional argument raised in Palcko's Opposition Brief, Airborne asserted alternative bases of jurisdiction in its Reply Brief, including pendent appellate jurisdiction, 28 U.S.C. § 1292(a)(1) and the collateral order doctrine. (Reply Brief of Appellant Airborne, 7-11)

The Court of Appeals identified the principal questions before it as "the scope of the exclusion from the FAA for a 'class of workers engaged in foreign or interstate commerce' and the preemptive effect, if any, of the statutory exclusion." (Pet'r App. 2a) The Court determined first that its jurisdiction over the District Court's order "is clear" under § 16(a) of FAA. (Pet'r App. 6a) It then rejected Airborne's argument that Palcko, a management employee who merely supervised the intrastate activities of drivers handling freight locally and who was not subject to a statutory employment dispute resolution scheme, is not

within a class of workers similar to seamen and railroad employees. The Court concurred with the District Court's finding that Palcko's Agreement is "exempt from the FAA's coverage because she is a transportation worker engaged in interstate and foreign commerce" under § 1 of the statute. (Pet'r App. 10a)

The Court of Appeals then stated that § 16(a) of the FAA did not cover "its review of a non-FAA, state-law arbitration claim in an otherwise unappealable interlocutory order" but determined that it could exercise pendent appellate jurisdiction, "which is discretionary and narrow in nature", to review the issue of the FAA's preemptive effect over Washington state law governing arbitration. (Pet'r App. 10a-12a) The Court further held that the District Court "erred in holding Palcko's exemption status under section 1 of the FAA preempts the enforcement of the arbitration agreement under Washington state law." (Pet'r App. 14a)

The Court of Appeals' opinion, filed on June 18, 2004, reversed the order of the District Court denying enforcement of the arbitration agreement under Washington state law and remanded for further proceedings consistent with its opinion. Petitioner filed her Petition for a Writ of Certiorari on September 16, 2004.

REASONS FOR DENYING THE WRIT

The plain language of § 16(a) of the FAA provides for the Court of Appeals' jurisdiction over the District Court's order, the Court of Appeals exercised pendent appellate jurisdiction in accordance with well-established precedent to ensure meaningful review of the order, and the decision, limited to its unique facts, correctly reverses a District Court ruling on federal preemption that has no support in legal precedent. There is no compelling reason, therefore, for this Court to grant the Petition.

I. THE COURT OF APPEALS DID NOT DECIDE AN ISSUE OF STATE LAW AS SUGGESTED BY PETITIONER'S STATEMENT OF THE QUESTION

Palcko's statement of the Question Presented incorrectly asks whether "the Court of Appeals had pendent appellate jurisdiction to review *under state law* the District Court's interlocutory order . . ." (Petition at i)(emphasis added). The Court of Appeals exercised pendent appellate jurisdiction to review whether the § 1 exclusion preempted state law favoring arbitration, a question of federal statutory construction. The District Court did not consider the provisions of state law at all. (Pet'r App. 30a, n.2) The Court of Appeals clearly stated that it was "considering whether the inclusion of the exemption clause [in § 1 of the FAA] was intended to preempt state law regarding enforcement of arbitration agreements" (Pet'r App. 12a), that is, engaging in the construction of a federal statute to determine a question of federal preemption. Palcko is not foreclosed from raising issues about the enforceability of the Agreement under state law on remand.

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' EXERCISE OF PENDENT APPELLATE JURISDICTION, BASED ON THE UNIQUE CIRCUMSTANCES OF THIS CASE, IS CONSISTENT WITH THE GUIDANCE OF THIS COURT AND WITH CONTROLLING PRECEDENT

A. The Court of Appeals Correctly Held That It Had Primary Jurisdiction Over The District Court's Order Under the Plain Language of § 16(a) of the FAA

The Court of Appeals correctly held that it had jurisdiction under § 16(a) of the FAA over the District Court's order "denying a petition under section 4 of this title to order arbitration to proceed". 9 U.S.C. § 16(a)(1)(B). The unanimous decision, written by Circuit Judge Sloviter, relied upon *Sandvik AB v. Advent International Corporation*, 220 F.3d 99 (3d Cir. 2000), an opinion authored by Chief Judge Becker. *Sandvik* analyzed § 16(a) at length, concluding that the "more natural" reading of § 16(a) "would be to treat *all* orders declining to compel arbitration as reviewable." *Id.* at 103 (emphasis added).

As stated in *Sandvik*, § 16 evinces "clear Congressional intent that challenges to refusals to compel arbitration be promptly reviewed by the appellate courts." *Id.* at 100 ("plain language" contemplates interlocutory appeals from orders denying arbitration because of questions related to their validity). The statute does not limit appeals to orders denying arbitration on specified grounds. To the contrary, § 16(b) lists certain arbitration-related orders that are not immediately appealable and makes no such distinction, further supporting the Court of Appeals' conclusion in this case that it had primary jurisdiction over the District Court's order. As with the statute construed in *Smith v. Vulcan*, 165 U.S. 518, 524-25

(1897), the "grammatical construction and natural meaning" of § 16(a) allows "an appeal to be taken from *the whole* of such interlocutory order or decree" (appeal under an act authorizing interlocutory appeals granting or continuing injunctions in patent cases not limited to only that part of the order which grants or continues an injunction).[1]

Palcko's argument concerning pendent appellate jurisdiction rests upon the incorrect assumption that "there was no primary appellate jurisdiction in this case," asserting that § 16(a) of the FAA authorizing an interlocutory appeal was inapplicable because she "is a transportation worker exempted from the Act." (Petition at 9) That assumption ignores Palcko's acknowledgement elsewhere in the Petition that the Court of Appeals had primary jurisdiction to determine whether she fell within the exemption provision of § 1 of the FAA. (Petition at 4) It also ignores the plain language of § 16(a). As the Court of Appeals observed:

> Palcko's argument would create the curious situation in which either all district courts' orders denying arbitration based on § 1's exemption clause would be beyond appellate review, which contradicts section 16(a)'s plain language, or the determination of our appellate jurisdiction would be contingent on the outcome of our review of the District Court's finding on the exemption question, which is precisely what we are barred from doing in the absence of appellate jurisdiction.

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[1] Review of the entire order would also be appropriate under 28 U.S.C. § 1292(a)(1), if not also under the collateral order doctrine, because the District Court's order effectively enjoined arbitration and, as such, is an interlocutory injunction. *See, e.g., Gulfstream Aerospace Corporation v. Mayacamas Corporation*, 485 U.S. 271, 287-88 (1988)(§ 1292(a)(1) will "continue to provide appellate jurisdiction over orders that . . . have the practical effect of granting or denying injunctions and have 'serious, and perhaps irreparable consequences.'").

Other Courts of Appeal similarly construe the plain language of § 16(a). *See Snowden v. Checkpoint Check Cashing,* 290 F.3d 631, 635-36 (4th Cir.)(ruling that under § 16(a), unequivocal record reflecting denial of motion to compel arbitration "is all that is necessary" to grant appellate jurisdiction), *cert. denied,* 537 U.S. 1087 (2002); *Boomer v. AT&T Corporation,* 309 F.3d 404, 412 (7th Cir. 2002)(concluding that the plain language of § 16(a) provides for an immediate appeal from ". . . 'an order denying a petition to order arbitration to proceed'", stating that the Third Circuit's decision in *Sandvik AB v. Advent International Corporation, supra,* 220 F.3d 99 (3d Cir. 2000), "provides a thorough analysis of the issue and one that bears repeating"); *Koveleskie v. SBC Capital Markets, Inc.,* 167 F.3d 361, 363 (7th Cir.) (holding that order denying motion to compel arbitration is immediately appealable under § 16(a), even though order states that discovery needed before arbitrability can be decided), *cert. denied,* 528 U.S. 811 (1999); *McLaughlin Gormley King Company v. Terminix International Company, L.P., 105* F.3d 1192, 1193 (8th Cir. 1997)(ruling that "an order that favors litigation over arbitration . . . is immediately appealable under § 16(a)"). *See also, Microchip Technology Incorporated v. U.S. Phillips Corporation,* 367 F.3d 1350 (Fed. Cir. 2004) (finding that § 16(a) allows for immediate appeal of the denial of a motion to compel arbitration even where district court intended to reconsider the question of arbitrability) and *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159 (5th Cir. 2004)(holding that § 16(a)(1) confers jurisdiction over appeal of order denying arbitration notwithstanding district court's opinion that the documents at issue failed to constitute a binding agreement to arbitrate).

Contrary to Palcko's assertion, *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Company,* 84 F.3d 988 (7th Cir. 1996) does not support the notion that the Court of Appeals lacked primary jurisdiction

in this case. In the more recent *Boomer* decision, the Court of Appeals for the Seventh Circuit adopted the *Sandvik* analysis, which rejects a refusal to follow the plain text of § 16 and also rejects the premise expressed in *Central States* that there is no harm in forcing a party to endure protracted litigation only to be vindicated, after trial, by an appellate ruling that the case should have been sent to arbitration. As stated in *Sandvik*, "the FAA's text and the precedent interpreting it militate against" forcing a party to endure "a full trial on the underlying controversy before it can receive a definitive ruling on whether it was legally obligated to participate in such a trial in the first instance." 220 F.2d at 104.

The interlocutory order from which the appeal was taken in *Central States* also differs significantly from the order in this case. It did not reach any issue under the FAA, let alone the exemption issue, so the Court's determination that it lacked appellate jurisdiction was not contingent upon its review of the district court's findings, as would have been required below. Rather, the interlocutory order in *Central States* refused to compel "alternative dispute resolution" under a collective bargaining agreement on the ground that the defendant waived any right to arbitration by waiting for nearly a year before invoking the provision, conducting discovery and filing status reports. *Id.* at 990.

Microchip, also cited by Palcko as evidence of a conflict among the Circuit Courts over primary jurisdiction, is equally inapposite because it did not involve a § 1 exemption issue under the FAA and because the Court, consistent with the decision below, found primary appellate jurisdiction to review the denial of an order compelling arbitration. *Id.* at 1355 (stating that § 16(a) reflects a Congressional determination that denials of orders to arbitrate have "serious, perhaps irreparable,

consequences").[2] Palcko's reliance on *Rodriguez v. Handy,* 802 F.2d 817 (5th Cir. 1986) to suggest that the Court below erred in exercising pendent appellate jurisdiction is equally misplaced where, as here, the Court of Appeals correctly concluded that it had primary appellate jurisdiction under § 16(a) over at least one of the two District Court's rulings subsumed within its single order denying arbitration.

B. It Was Proper for the Court of Appeals to Exercise Its Jurisdiction Over the District Court's Order in Its Entirety

1. The Court of Appeals Properly Stated the Permissible Applicable Law of Pendent Appellate Jurisdiction

Palcko does not dispute that if primary appellate jurisdiction existed, the Court of Appeals' discretionary exercise of pendent appellate jurisdiction was proper. Palcko does not and cannot take issue with the Court of Appeals' articulation of pendent appellate jurisdiction, which is derived from this Court's formulation in *Swint v. Chambers County Commission,* 514 U.S. 35 (1995).

In *Swint,* this Court rejected the exercise of pendent party appellate jurisdiction based solely on reasons of judicial economy and, in the process, intimated when the exercise of pendent appellate jurisdiction might be proper. *Id.* at 50-51. The Court subsequently confirmed *Swint's* approach in *Clinton v. Jones,* 520 U.S. 681, 707, n. 41 (1997), holding that the appellate court properly exercised pendent appellate jurisdiction because the District Court's legal

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[2] It did so by reading § 16(a) as "removing the barriers to appellate jurisdiction under 28 U.S.C. § 1292(a)"(interlocutory appeals from injunctions). *Id.* 1354-55. The Federal Circuit, then, would reach the same result on primary jurisdiction as did the Third Circuit in this case, although on the basis of both § 16(a) and § 1292(a) rather than just § 16(a).

ruling on the appealable ruling was "inextricably intertwined" with its otherwise nonappealable ruling; and further holding that review of the latter decision was also necessary to ensure meaningful review of the former. This Court again held the exercise of pendent appellate jurisdiction to be proper in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 770. n.2 (2000), in which the Court of Appeals exercised pendent appellate jurisdiction over a nonappealable statutory question in conjunction with an appealable ruling on Eleventh Amendment immunity from suit under the statute.

The Court of Appeals for the Third Circuit closely adheres to this Court's dictates concerning pendent appellate jurisdiction, carefully following the reasoning in *Swint*, and the guidance in *Clinton* and *Vermont*. In *E.I. Dupont De Nemours and Company v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 202-03 (3d Cir. 2001), relied upon in the decision below, the Court of Appeals explained that "post-*Swint*, we have defined pendent appellate jurisdiction to mirror the Supreme Court's two examples: inextricably intertwined orders or review of the non-appealable order where it is necessary to ensure meaningful review of the appealable order". Pendent appellate jurisdiction, which is "discretionary and narrow in scope," "should be used 'sparingly,' and only where there is sufficient overlap in the facts relevant to both . . . issues to warrant plenary review." *Id.* at 203, *citing In re Montgomery County*, 215 F.3d 367, 375-76 (3d Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001).

This approach to the exercise of pendent appellate jurisdiction is consistent with the post-*Swint* approach taken by other Courts of Appeals. As recently observed by the Court of Appeals for the District of Columbia Circuit, other circuits "will *only* take pendent appellate jurisdiction when one or both of the *Swint* conditions appear". *Kilburn v.*

Socialist's People's Libyan Arab Jamahiriya and Libyan External Security Organization, 376 F. 3d 1123, 1134 (D.C. Cir. 2004)(collecting post-*Swint* cases in the appellate courts)(noting D.C. Circuit's view that *Swint* not meant to describe a definitive or exhaustive list of conditions for exercising pendent appellate jurisdiction but that it should be exercised "sparingly" and "only when substantial considerations of fairness or efficiency demand it").

2. The Court of Appeals Properly Exercised Pendent Appellate Jurisdiction Because of the Overlapping Facts Warranting Plenary Review, the Closely Intertwined Issues and the Need to Meaningfully Review the Appealable Order

In keeping with its post-*Swint* approach, the Court of Appeals correctly concluded that it should exercise pendent appellate jurisdiction over the federal preemption issue in this case, even if, as Palcko urges, only the exemption issue arising under § 1 is appealable under § 16(a) of the FAA. Both issues involve federal questions arising from the same statutory language, both consider arbitrability, both involve the same operative facts separate from the merits of the dispute, and both arise in an order over which § 16(a) authorizes an interlocutory appeal.

The FAA exemption issue and the FAA preemption issue "arise from a single arbitration agreement that provides alternative grounds for the arbitration of all claims arising from Palcko's employment with Airborne." Palcko's [illegible] VII and state law claims both "arise from the same set of facts related to her conditions as an Airborne employee." (Pet'r App. 11a) This overlap of identical facts "warrants plenary review" and, the Court further found, the issues are "so closely intertwined" "that our taking of pendent

appellate jurisdiction over the former is necessary to ensure meaningful review of the District Court's order *in its entirety*." (Pet'r App. 11a)(emphasis added).

The preemption issue did not implicate any parties, facts or statutory provisions beyond those addressed under the exemption issue. The Court of Appeals' exercise of pendent appellate jurisdiction over these closely intertwined issues was as narrow as that exercised in *Clinton* and considerably more narrow than that exercised in *Vermont*. In *Vermont*, the Second Circuit's review of the nonappealable statutory question involved construction of the statutory definition of "person" under the False Claims Act, as opposed to the inquiry under multiple other provisions of the Act relating to the federal government's rights, authority and control to determine whether the plaintiff or the United States was the real party in interest for purposes of determining whether immunity under the Eleventh Amendment existed. *See Vermont Agency of Natural Resources v. United States*, 162 F.3d 195 (2d Cir. 1998), *rev'd*, 529 U.S. 765 (2000).

The nature of the District Court's order in this case and the consequences of a deferred review further compelled the exercise of pendent appellate jurisdiction to ensure meaningful review. As recently explained in *CTF Hotel Holdings, Inc. v. Marriott International, Inc.*, 381 F.3d 131 (3d Cir. 2004), resolution of the nonappealable preemption issue in this case necessitated "a particular ruling on the appealable order". *Id.* at 142 (Smith, C.J. concurring in part and dissenting in part). Reversal of either the exemption ruling or the preemption ruling would necessarily lead to action on the single order, which is clearly appealable under § 16(a). Further, had jurisdiction not been exercised in this case, reversal of the preemption issue from a final order "would be meaningless" because Airborne "would have already been subjected to the protracted litigation that it

sought to avoid through the arbitration agreement." *Id.* at 141-42. *Accord, Powers v. The Southland Corporation,* 4 F.3d 223, 230-31 (citations omitted), *reh'g en banc denied,* 4 F.3d 223 (3d Cir. 1993) (explaining that "legal and practical value" of asserted right not to litigate "would be destroyed if not vindicated before trial"). *See also Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 342 (8th Cir. 1990)(stating that "denial of a motion to compel arbitration can only be effectively challenged on immediate appeal because the advantages of arbitration will be forever lost if the appeal is delayed") and *Kansas Gas & Electric Company v. Westinghouse,* 861 F.2d 420, 422 (4th Cir. 1988)(stating that orders denying arbitration have injunctive effect and serious consequences because they force parties to undergo expense of trial before able to appeal).

The logical inverse of Palcko's challenge to the Court of Appeals' exercise of pendent appellate jurisdiction because it found her within the § 1 exemption is that pendent appellate jurisdiction may be exercised over the federal preemption issue only when a worker is within the FAA's coverage – precisely when no issue of preemption arises and review would be meaningless. Accepting this argument means that meaningful review of the preemptive effect of the § 1 exemption would always be foreclosed even when, as here, the District Court so clearly erred on the preemption issue.

Neither the District Court nor Palcko cited any authority to support the proposition that § 1 preempts state law favoring arbitration. In contrast, the Court of Appeals correctly applied Supreme Court precedent in analyzing the District Court's preemption ruling, including *Bernhardt v. Polygraphic Company,* 350 U.S. 198, 202 (1956)(directing federal court to apply state law governing arbitration agreement where agreement is not subject to FAA) and *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford*

Junior University, 489 U.S. 468, 477 (1989)(citing *Bernhardt* as "upholding application of state arbitration law to arbitration provision in contract not covered by the FAA" and upholding the parties' choice of state rules regarding arbitration).

The Court of Appeals' decision is also consistent with the uniform suggestions of courts that have looked at the issue under § 1 without squarely having to decide it. *See, e.g., Cole v. Burns International Security Services*, 105 F.3d 1465, 1472 (D.C. Cir. 1997)(expressing "little doubt" that even if an arbitration agreement is outside the FAA, the agreement may still be enforced under contract law); *Harden v. Roadway Packages Systems, Inc.*, 249 F.3d 1137, 1141 (9th Cir. 2001)(intimating that arbitration could be compelled under state law to a trucker excluded under § 1 of the FAA but that trucker waived state law by relying solely upon the FAA to compel arbitration); *see also Great Western Mortgage Company v. Peacock*, 110 F.3d 222 (3d Cir.)(stating that "in the absence of a state law which discourages the enforcement of arbitration agreements, no question of pre-emption, as such, is presented"), *cert. denied*, 522 U.S. 915 (1997).

C. The Court of Appeals' Exercise of Jurisdiction In This Case Is Consistent With and Harmonizes the Multiple Federal and State Policies and Interests at Stake

The exercise of jurisdiction over the preemption issue in this case is consistent with and, indeed, harmonizes the multiple federal and state policies and interests at stake. It furthers the federal policy reflected in the FAA of favoring the enforcement of arbitration agreements according to their terms. It is also consistent with the fundamental policy underpinnings of federalism by facilitating State interests and the traditional deference to state law in an area such as contract law. *See e.g., Medtronic, Inc. v. Lora Lohr et Vir Lora Lohr*, 518 U.S. 470, 485 (1996) (presumption "that the historic

powers of the States [are] not to be superceded by the Federal Act unless that was the clear and manifest intent of Congress") and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)(whether a party agreed to arbitrate a particular dispute remains a question of state law governing contract formation, notwithstanding the enactment of the FAA).

The exercise of jurisdiction over the preemption issue is also consistent with federal and state policies favoring the arbitration of the Title VII and Pennsylvania claims at issue in this case. *See* 42 U.S.C. § 12212 (2003)(amending Title VII to encourage the arbitration of disputes) and *Smith v. Cumberland Group, Ltd.*, 455 Pa. Super. 276, 687 A.2d 1167, 1171 (Pa. Super. 1997)(holding that if a valid arbitration agreement exists and the claim is within the scope of the agreement, the controversy must be arbitrated). Washington law also favors arbitration, including specifically in the employment context. WASH. REV. CODE, §§ 7.04.010 (2004).

The exercise of pendent appellate jurisdiction in this case also respects a Congressional direction concerning the timing of appellate proceedings involving orders denying motions to compel arbitration.[3] Just as Congress has given "statutory instructions . . . to control the timing of appellate proceedings" through 28 U.S.C. § 1291 and § 1292, *Swint, supra*, at 48, it has provided clear instructions on the timing of appeals of orders denying motions to compel arbitration through § 16(a).

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[3] The concern expressed in *Swint* over the potential of undermining the two-tiered arrangement of § 1292(b) if courts of appeals had discretion to append further rulings to a *Cohen*-authorized appeal is not present in this case, where Congress, not the courts of appeals, has expressly authorized an interlocutory appeal. The Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, authorizing this Court to prescribe rules defining when a district court ruling is final for purposes of § 1291 and to provide for appeals of interlocutory decisions is not affected for the same reason.

The Court of Appeals' exercise of jurisdiction over the preemption issue arising under § 1 of the FAA under the circumstances of this case harmonizes all of the applicable federal and state policies while avoiding the conflict created by using the § 1 exclusion to undermine the FAA's primary purpose - to overcome judicial hostility towards enforcing arbitration agreements according to their terms - and § 16(a)'s specific purpose to permit meaningful review of interlocutory orders denying arbitration. It properly did so while also furthering important policies of judicial economy, efficiency and fairness to the parties by resolving an issue fundamental to the conduct of the case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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